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No. 93-894

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD W. MCLAREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, when a suspect reinitiates a custodial interview after invoking his right to counsel, the suspect's resulting admissions can be admitted into evidence.

2. Whether the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, may appoint commissioned officers to serve as military trial and appellate judges.

3. Whether the Due Process Clause of the Fifth Amendment requires that military trial and appellate judges be appointed to their judicial duties for fixed terms.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-20a) is reported at 38 M.J. 112. The opinion of the Air Force Court of Military Review (Pet. App. 21a-38a) is reported at 34 M.J. 926.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1993. The petition for a writ of certiorari was filed on December 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted by a general court-martial of attempted rape, rape, sodomy (2 specifications), and committing indecent acts with his step-daughters (3 specifications), in violation of Articles 80, 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 920, 925, and 934. He was sentenced to a dishonorable discharge, confinement for 35 years, forfeiture of $424 pay per month for 420 months, and reduction to the lowest enlisted grade. The convening authority reduced the confinement to 15 years pursuant to a pretrial agreement, but otherwise approved the sentence. The Air Force Court of Military Review affirmed the findings and approved the sentence. Pet. App. 38a. The Court of Military Appeals affirmed. Pet. App. 1a-20a.

On April 15, 1990, Special Agent Sarantis of the Air Force Office of Special Investigations received a complaint that petitioner had been sexually abusing the older of his two step-daughters. The following day, Sarantis interviewed both step-daughters at the base clinic. On April 17, Sarantis went to petitioner's on-base quarters intending to advise petitioner's wife of the allegations against her husband and to ask her to accompany him to the base clinic. Both petitioner and Mrs. McLaren answered the door. Sarantis told Mrs. McLaren that he needed to speak with her at the clinic. Mrs. McLaren went to the clinic with Sarantis and Special Agent Bianco, while petitioner followed in another car. When they reached the clinic, petitioner asked what was going on. Sarantis responded that he would talk to petitioner later. Pet. App. 3a.

Later that day, Agents Sarantis and Bianco returned to petitioner's quarters and Sarantis asked to talk to petitioner. The three drove to the clinic in a government vehicle and entered a conference room in the clinic where Sarantis read petitioner the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and Article 31(b), UCMJ, 10 U.S.C. 831(b). See *United States* v. *Tempia*, 37 C.M.R. 249 (C.M.A. 1967). Agent Sarantis then informed petitioner that he was suspected of rape, carnal knowledge, and assault with a deadly weapon. When Sarantis asked petitioner if he wanted a lawyer, petitioner responded, "Not at this time." Petitioner then indicated that he wanted to talk. Pet. App. 3a.

After some preliminary questions, Agent Sarantis steered the conversation toward the allegations of sexual abuse. Sarantis asked petitioner when he first had sex with his older step-daughter. Petitioner responded, "These things happen." Sarantis then repeated the question. At that point, petitioner looked down and said something to the effect of "I think I want a lawyer," or "I think I need to talk to a lawyer." Sarantis responded, "Well, yes, these charges seem —are serious." Agent Bianco said, "Yes, this is a decision you'll have to make. We can't force you to stay here. You need to decide what you want to do." Pet. App. 3a-4a.

After a brief pause, without further questions or comments from the two agents, petitioner "began talking again." Petitioner responded to Sarantis's last question, saying, "It just happened." The interview then resumed, and petitioner confessed. His oral confession was then typed, signed, and sworn to. Pet. App. 4a.

Prior to entering conditional pleas of guilty, petitioner moved to suppress his April 17, 1990, confession. The defense maintained that his statements were taken in violation of Article 31, UCMJ, 10 U.S.C. 831, and the Fifth Amendment to the United States Constitution. The military judge denied the defense motion, finding that "[a]fter a pause, and apparent reflective deliberation about his verbalized thoughts concerning his perceived need for a lawyer, [petitioner] resumed the interrogation process by proceeding to answer the incriminatory question previously posed." Additionally, the judge found that "[t]he agents reasonably construed this resumption by the accused as an election by him not to then act on his perceived need, if any, for a lawyer." Pet. App. 5a.

DISCUSSION

1. Petitioner argues (Pet. 7-10) that his remark about getting a lawyer was, at the least, an ambiguous reference to counsel, and that the agents should have "cease[d] all questioning once petitioner mentioned the word 'attorney.'" Pet. 10. He contends that the issue presented in this case is the same as the issue presented in *Davis* v. *United States*, cert. granted, No. 92-1949 (Nov. 1, 1993).

Contrary to petitioner's contention, this case does not present the question presented in *Davis*. In this case, the military judge, the court of military review, and the Court of Military Appeals all found that petitioner did not make an ambiguous request for counsel that was followed by questioning designed to clarify that request. Instead, all three courts found that after petitioner made his statement about a lawyer, the interrogation ceased. Petitioner then

paused and re-initiated the interrogation himself. See Pet. App. 5a, 7a, 8a, 28a.[1]

The Court of Military Appeals analyzed the case "as if [petitioner] had unequivocally requested a lawyer." Pet. App. 7a. At that juncture, the court concluded, petitioner's responses to further interrogation were admissible only if petitioner both initiated further discussion with the agents and knowingly and intelligently waived the right he had invoked. *Ibid.* Agreeing with the findings of the two lower courts, the Court of Military Appeals concluded that petitioner had done both. The court explained (Pet. App. 8a):

> [Petitioner] initiated the conversation by talking after the agents told him that they could not force him to stay and that he needed to make a decision; he waived his previously invoked right to counsel by answering the previously asked question which had preceded his mention of a lawyer. We are satisfied that [petitioner's] voluntary reinitiation of the interview and implied waiver of his previously invoked right to counsel were sufficient to satisfy *Miranda* v. *Arizona* * * * .

In light of the findings of the military courts, the legal issue in this case is whether petitioner can validly be charged with having reinitiated the interview, so that his earlier request for counsel—even assuming it to be unambiguous—was no longer effective. In *Oregon* v. *Bradshaw*, 462 U.S. 1039

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[1] The Court of Military Review concluded that petitioner's interrogation was custodial and that he was therefore properly (and necessarily) advised of his right to the presence of counsel. Pet. App. 26a n.2.

(1983), this Court held that conduct similar to petitioner's conduct in this case was sufficient to constitute "reinitiation" of the interview at the behest of the suspect, and thus to relieve the agents of any further obligation not to question the suspect in the absence of counsel.

Nothing that the agents said to petitioner after he made his remark about obtaining a lawyer could fairly be construed as designed to dissuade him from seeking the advice of counsel. In fact, the agents' brief comments—to the effect that the charges were indeed serious and that the agents could not compel petitioner to remain—suggested that seeking counsel was a wise course and one that petitioner was free to pursue. When petitioner then decided to resume the interview by answering the last question that Agent Sarantis had asked, it was reasonable for the military courts to conclude that petitioner in effect reinitiated the interrogation and implicitly waived the right he had arguably previously invoked. In light of the factual findings of the lower courts, the issue in this case is simply whether the military courts properly applied the principles of *Oregon* v. *Bradshaw* to this factually similar case. That question neither calls for this Court's review nor requires that this petition be held pending the Court's resolution of the quite distinct issue presented in *Davis* v. *United States*.

2. Petitioner next argues (Pet. 10-13) that the military trial and appellate judges in his case were appointed in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, and that the lack of fixed tenure for the judges in his case rendered the proceedings against him fundamentally unfair.

Those questions are the same as those presented in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), which is pending before the Court. Accordingly, we believe that this petition should be held until this Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.[2]

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[2] We note that petitioner did not raise either claim at any stage of his case. What is more, no military court addressed those questions in his case. Accordingly, it is not clear that they are subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. IV 1992), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the accused. Article 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since petitioner did not raise those issues for review by the Court of Military Appeals and since that court did not pass on them, there is a question whether that court rendered a decision on those issues.

It is unnecessary to answer that question in this case, however, because the Court of Military Appeals has indicated that it will accept out-of-time requests for relief from servicemembers if this Court grants relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United State* v. *Rice*, 36 M.J. 264 (C.M.A. 1993). Thus, if this Court grants relief to the petitioners in *Weiss*, it may be appropriate to allow the Court of Military Appeals to decide whether to grant relief to parties such as petitioner, since that course may render moot the question whether this Court can grant relief to such parties.

CONCLUSION

With respect to questions 2 and 3, the petition for a writ of certiorari should be held pending this Court's decision in *Weiss v. United States*, No. 92-1482, and then disposed of in light of the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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